No. 14-510

In The Supreme Court of the United States

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE BASIS FOR THE INDIAN SELF-DETERMINATION ACT IS THE HISTORIC AND UNIQUE RELATIONSHIP BETWEEN THE UNITED STATES AND INDIAN TRIBES 5

A. The United States Has Historically Recognized A Unique Relationship With Indian Tribes 5

B. The Federal-Tribal Relationship Is Firmly Incorporated In The Indian Self-Determination Act 6

C. The Self-Determination Act Provides For Tribal Contracting Of Federal Responsibilities To Indians Such As Health Care 8

II. THE SELF-DETERMINATION ACT'S STRONG PROTECTIONS FOR TRIBAL CONTRACTORS ARE BASED ON BOTH GOVERNMENT CONTRACT LAW AND THE UNIQUE FEDERAL-TRIBAL RELATIONSHIP 10

A. Federal Agencies Quickly Took Advantage Of The Act's Failure Originally To Provide For Contract Support Costs ... 11

TABLE OF CONTENTS – Continued

Page

B. Congress Responded With Amendments Mandating Contract Support Cost Payments 13

C. Continued Agency Resistance Led To Further Amendments With Unique Protections For Tribal Contractors 19

III. WHILE THE ACT'S GOVERNMENT CONTRACT LAW PROVISIONS ARE THE BASIS FOR CONTRACT ENFORCEMENT AND LIABILITY, PROCEDURAL AND REMEDIAL ISSUES LIKE EQUITABLE TOLLING SHOULD TAKE INTO ACCOUNT THE UNIQUE NATURE OF THESE CONTRACTS AND THEIR FEDERAL-TRIBAL RELATIONSHIP UNDERPINNINGS 24

A. Despite The Amendments, Agency Resistance Persisted And Indian Health Service Contract Support Cost Funding Shortfalls Skyrocketed To Over $100,000,000 24

B. This Court's Decisions In *Cherokee* and *Ramah* Relied On The Act's Government Contract Law Provisions To Determine Federal Liability For Contract Cost Payment 26

TABLE OF CONTENTS – Continued

Page

C. Self-Determination Act Contract Claim Procedural And Remedial Issues Should Take Into Account The Act's And The Contracts' Unique Protections Based On The Federal-Tribal Relationship 28

CONCLUSION 32

TABLE OF AUTHORITIES

Page

CASES

Alamo Navajo Sch. Bd., 1988 WL 44359 (Interior B.C.A., Feb. 24, 1988) 13

Arctic Slope Native Ass'n v. Department of Health and Human Servs, 11-2 B.C.A. ¶ 34,778 (C.B.C.A. 2011) 32

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Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990) 28

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Michigan v. Bay Mills Indian Community, 134 S.Ct. 2024 (2014) 6

TABLE OF AUTHORITIES – Continued

Page

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United States v. Lara, 541 U.S. 193 (2004) 6

TABLE OF AUTHORITIES – Continued

Page

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U.S. Const. Art. I 6, 9

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25 U.S.C. § 450(a) 2, 7

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25 U.S.C. § 450c(f) 22

25 U.S.C. § 450e(c) 22

25 U.S.C. § 450f(b)(3) 21

25 U.S.C. § 450f(e) 21

25 U.S.C. § 450j(a)(1) 22

25 U.S.C. § 450j-1 11

25 U.S.C. § 450j-1(a) 16, 27

25 U.S.C. § 450j-1(a)(1) 4

TABLE OF AUTHORITIES – Continued

Page

25 U.S.C. § 450j-1(a)(2) 4
25 U.S.C. § 450j-1(a)(3)(B) 21
25 U.S.C. § 450j-1(b) 16, 21
25 U.S.C. § 450j-1(c) 16
25 U.S.C. § 450j-1(g) 4, 21
25 U.S.C. § 450j-1(l)(1) 22
25 U.S.C. § 450j-1(l)(2) 22
25 U.S.C. § 450k 22
25 U.S.C. § 450*l*(a)(1) 20
25 U.S.C. § 450*l*(c)-(b)(4) 21
25 U.S.C. § 450*l*(c)-(b)(6)(B) 21
25 U.S.C. § 450*l*(c)-(b)(7)(C) 22
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25 U.S.C. § 450m 21
25 U.S.C. § 450m-1(a) 18, 21, 27
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Snyder Act, 25 U.S.C. § 13 9

OTHER AUTHORITIES

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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INTEREST OF *AMICUS CURIAE*

The National Congress of American Indians ("NCAI") was founded in 1944 and is the oldest and largest tribal government organization in the United States.[1] NCAI serves as a forum for consensus-based policy development among its membership of over 250 tribal governments from every region of the country. Its mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights, and a broad range of federal legislative and policy issues affecting tribal governments. NCAI and its members have considerable experience with the history and operation of contracts between the federal government and tribes under the Indian Self-Determination and Education Assistance Act of 1975.

This Court recently has twice examined the claims of tribal contractors under the Indian Self-Determination Act for payment in full by the government of costs to support the contracts. In both cases, *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), and *Salazar v. Ramah Navajo Chapter*, 132 S.Ct. 2181 (2012), the Court rejected the government's non- or under-payment arguments as contrary to the Act's full payment mandate. In both *Cherokee* and *Ramah*, NCAI filed *amicus curiae* briefs to assist the Court in

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[1] No counsel for any party authored this brief in whole or in part. No one other than *amicus curiae* made a monetary contribution to fund the preparation or submission of this brief. The parties have consented to the filing of the brief, and letters of consent have been filed with the Clerk.

understanding the Act's history and federal Indian policy with respect to tribal contract support cost claims. NCAI submits this *amicus* brief in the present case in order to demonstrate why the historic and unique relationship between tribes and the federal government that is embedded in the Indian Self-Determination Act should be a factor when equitable tolling is considered for application to the timeliness of such claims.

SUMMARY OF ARGUMENT

The Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975), *codified as amended at* 25 U.S.C. §§ 450 *et seq.*, allows Indian tribes as sovereigns to contract the operation of federal programs and services provided to Indian people. The Act is the modern centerpiece of "the Federal government's historical and special legal relationship with, and resulting responsibilities to, American Indian people. . . ." 25 U.S.C. § 450(a). Widely-heralded as a groundbreaking departure from antiquated and failed federal Indian policies when it was enacted, from its outset the Self-Determination Act has met with continuing resistance to its full implementation by federal bureaucrats. "[T]he success of the self-determination policy urged by previous Republican administrations . . . provided . . . meaningful changes in [federal] Indian policy [but] . . . problems . . . have developed in the [Act's] implementation. . . ." *Oversight of Indirect*

Costs and Contract Provisions of the Indian Self-Determination and Education Assistance Act: Hearing before the S. Select Comm. on Indian Affairs, 97th Cong., at 1 (1982). To protect their own responsibilities and resources, federal agencies delayed or denied contracts to tribes, and they refused to pay in full the costs to tribes to support their contracts. *See generally* S. Rep. No. 100-274, at 6-13 (1987). "The federal service bureaucracy that was supposed to be reduced as tribes assumed control of programs has been replaced by a contract monitoring bureaucracy." *Id.* at 7. This resulted in tribal reluctance to contract as well as tribes subsidizing the costs of operating the contracts. *Id.* at 8-9; *see also Oversight of Indirect Costs and Contract Provisions of the Indian Self-Determination and Education Assistance Act: Hearing before the S. Select Comm. on Indian Affairs*, 97th Cong., at 1-2 (1982).

Congress has repeatedly responded to the bureaucratic efforts to obstruct the implementation of the Act's core provisions. Amendments to the Act in 1988 and 1994 fortified tribal self-determination contracting, enabled contract enforcement, and expressly provided for full payment to tribes of all contract amounts, including contract support costs. Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285 (1988); Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, tit. I, 108 Stat. 4250 (1994). To achieve the Act's goal of contractually transferring the operation of key federal

Indian services and programs to tribes, Congress employed both general government contract law protections, and special safeguards for tribal contractors rooted in the inter-governmental federal-tribal relationship.

As this Court is well-aware, Congress' efforts did not deter agency defiance of statutory directives. In particular, claims by tribal contractors for full support cost payment led to the Court's decisions in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), and *Salazar v. Ramah Navajo Chapter*, 132 S.Ct. 2181 (2012), which establish federal liability for full payment. *Cherokee* and *Ramah* acknowledge the Act's full payment mandate. *Cherokee*, 543 U.S. at 634, *citing* 25 U.S.C. §§ 450j-1(a)(1) and (2); *Ramah*, 132 S.Ct. at 2186, *citing* 25 U.S.C. § 450j-1(a)(2), (g). They reason that the government contract law provisions incorporated into the Act suffice to enforce that mandate, *Ramah*, 132 S.Ct. at 2189 (Cherokee held that "the Government was obligated to pay the Tribes' contract support costs in full [and this conclusion] followed directly from well-established principles of Government contracting law."), while also relying on the Act's special pro-tribal rules of contract and statutory interpretation. *Id.* at 2187, 2193.

At issue here is the government's latest iteration of Self-Determination Act contract resistance. In an effort to reduce its liability, the government raises statute of limitations defenses to certain tribal support cost full payment claims. Against such procedural arguments, the Tribe argues for equitable tolling.

The Court of Appeals correctly reasoned that equitable tolling should apply, but then expressly refused to give any consideration to the unique federal-tribal relationship in analyzing equitable tolling. *Menominee Indian Tribe v. United States*, 764 F.3d 51, 62 (D.C. Cir. 2014). On this point, the Court of Appeals below erred. That refusal directly conflicts with *Arctic Slope Native Ass'n v. Sebelius*, 699 F.3d 1289, 1297-1298 (Fed. Cir. 2012), which specifically ruled that federal courts should take into account the federal-tribal relationship in determining whether equitable tolling is warranted in a Self-Determination Act contract support case. The federal-tribal relationship appropriately is a factor in the equitable tolling analysis because the relationship is the basis of significant statutory protections for tribal contractors against agency contract resistance and violations.

ARGUMENT

I. THE BASIS FOR THE INDIAN SELF-DETERMINATION ACT IS THE HISTORIC AND UNIQUE RELATIONSHIP BETWEEN THE UNITED STATES AND INDIAN TRIBES

A. The United States Has Historically Recognized A Unique Relationship With Indian Tribes

From its inception, the United States has had official government-to-government relations with

Indian tribes. *See, e.g., Warren Trading Post v. Arizona State Tax Comm'n*, 380 U.S. 685, 687 n.4 (1965) (first United States treaty with an Indian tribe was in 1778). In addition to the Constitutional provisions in Article I, *see United States v. Lara*, 541 U.S. 193, 200-201 (2004), "for much of the Nation's history, treaties, and legislation made pursuant to those treaties, [have] governed relations between the Federal Government and the Indian tribes." *Id.* at 201 (citation omitted). Decisions of this Court likewise have defined aspects of the federal-tribal relationship now for "[t]wo centuries. . . ." *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2040-2041 (2014) (Sotomayor, J., concurring). Federal law and policy concerning relations with tribes has passed through many phases over time, *see United States v. Lara*, 541 U.S. at 202, including those with "tragic consequences" such as "removal," "assimilation" and "termination," *id.*

B. The Federal-Tribal Relationship Is Firmly Incorporated In The Indian Self-Determination Act

Many aspects of federal-tribal relations today are governed by the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* Congress and this Court rightly attribute the Act's genesis to President Nixon. *See, e.g.*, S. Rep. No. 108-413, at 1 (2004) (the Act affirmed President Nixon's "rationales for a new, more enlightened Federal Indian policy: Indian Self-Determination."); *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458

U.S. 832, 840 & n.1 (1982) (*citing* President Nixon's Special Message to Congress on Indian Affairs, of July 8, 1970, as triggering the historic shift in federal policy that led to the Act); *see also* 161 Cong. Rec. E1017-05 (July 8, 2015) (Speech of Rep. Cole, R-OK, Commemorating the 45th Anniversary of President Richard M. Nixon's Special Message to Congress on Indian Affairs, and acknowledging that Congress responded with the Indian Self-Determination Act). Formally recognized as "milestone" legislation when it was enacted, see Statement of President Ford on Signing the Indian Self-Determination and Education Assistance Act (Jan. 4, 1975), available at http://www.presidency.ucsb.edu, the Act remains "one of the most important legislative acts affecting Indian country of the last four decades." S. Rep. No. 114-060, at 2 (2015).

The Indian Self-Determination Act expressly and prominently incorporates the federal-tribal relationship. "Congress [has carefully reviewed] the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people. . . ." 25 U.S.C. § 450(a) (Congressional statement of findings). "Congress declares its commitment to the maintenance of the Federal government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole. . . ." 25 U.S.C. § 450a(b) (Congressional declaration of policy). Legislative history confirms Congress' specific reliance on the federal-tribal relationship as the Act's foundation. H.R. Rep. No. 93-1600 (1974), *reprinted in* 1974

U.S.C.C.A.N. 7775, at 7781 (the new federal policy of Indian self-determination is "consistent with the maintenance of the Federal trust responsibility and the unique Federal-Indian relationship.").

C. The Self-Determination Act Provides For Tribal Contracting Of Federal Responsibilities To Indians Such As Health Care

The Indian Self-Determination Act "authorizes the Government and Indian tribes to enter into contracts in which the tribes promise to supply federally funded services" formerly provided by the government. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 634 (2005); *see also Salazar v. Ramah Navajo Chapter*, 132 S.Ct. 2181, 2186 (2012) (the Act directs agencies "to enter into contracts with willing tribes, pursuant to which those tribes will provide services such as education and law enforcement that otherwise would have been provided by the Federal Government."). As *Cherokee* and *Ramah* aptly recognize, Self-Determination Act contracts are the modern mechanism for tribal operation of federal services and programs undertaken by the government for Indians.

Indian health care is an established and significant federal responsibility. "Federal health care for Indian people began . . . [i]n the early 1800s. . . ." *The First 50 Years of the Indian Health Service: Caring & Curing*, at 7 (2005), available at http://www.ihs.gov/newsroom/factsheets. As with other federal Indian obligations,

> [t]he cession of most of the lands in the United States by the Indians, codified in hundreds of treaties, forms the basis for the Government's provision of health care to Indians. Many treaties identified health services as part of the Government's payment for Indian land. Indian treaties were contracts between the Federal and Tribal Governments. Indian Tribes gave up their land in return for payments and/or services from the U.S. Government.

The First 50 Years of the Indian Health Service: Caring & Curing, at 8; *accord id.* at 13 ("The earliest Federal services provided to Indians were based on treaties and were intended to compensate Indians for the land cessions and other benefits granted to the United States."); *see also* Indian Health Service, Agency Overview, http://www.ihs.gov/aboutihs/overview ("The provision of health services to members of federally-recognized Tribes grew out of the special government-to-government relationship between the federal government and Indian Tribes . . . established in 1787, . . . based on Article I, Section 8 of the Constitution, and . . . numerous treaties. . . .") .

In addition to treaties, the Snyder Act, 42 Stat. 208 (1921), *codified* at 25 U.S.C. § 13, "is the basic [statutory] authorization for Federal health services to U.S. Indian tribes." *The First 50 Years of the Indian Health Service: Caring & Curing*, at 8. Further, the Indian Health Care Improvement Act of 1976, Pub. L. No. 94-437, 90 Stat. 1400 (1976), *codified as amended at* 25 U.S.C. §§ 1601 *et seq.*, passed virtually

contemporaneously with the Indian Self-Determination Act, authorized additional funding, and consolidated existing and added new Indian health services and programs. "The Indian Health Care Improvement Act . . . [currently is] the cornerstone legal authority for the provision of health care to American Indians and Alaska Natives." Indian Health Service, Legislation, http://www.ihs.gov/aboutihs/legislation. The Indian Health Care Improvement Act expressly finds that "Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people." 25 U.S.C. § 1601(1).

With over 560 federally-recognized tribes and 2.2 million American Indians and Alaska Natives nationwide, federal appropriations in fiscal year 2015 to the Indian Health Service were $4.6 billion. http://www.ihs.gov/newsroom/factsheets/ihsyear2015profile. Over half of this appropriation amount is contracted or otherwise administered by tribes across the country through the Indian Self-Determination Act. *Id.*

II. THE SELF-DETERMINATION ACT'S STRONG PROTECTIONS FOR TRIBAL CONTRACTORS ARE BASED ON BOTH GOVERNMENT CONTRACT LAW AND THE UNIQUE FEDERAL –TRIBAL RELATIONSHIP

Notwithstanding its congressionally, presidentially – and tribally – heralded goals, the Indian

Self-Determination Act's implementation has been impeded at the agency level primarily because proper implementation would implicate the bureaucrats' interest in their own jobs. Unrelenting views and tenacious resolve have pushed and pulled the Act's implementation issues and reform efforts through many fora for many years. Above all, considerable federal, tribal, congressional and judicial efforts have been expended addressing "the Government's fiscal obligations with respect to . . . ISDA's . . . contract support costs. . . ." *Ramah*, 132 S.Ct. at 2195. Contract support costs generally are the reasonable administrative and overhead costs associated with carrying out Self-Determination Act contracts. *See* 25 U.S.C. § 450j-1.

A. Federal Agencies Quickly Took Advantage Of The Act's Failure Originally To Provide For Contract Support Costs

The Act did not originally expressly provide for contract support costs. *See* Pub. L. No. 93-638, 88 Stat. 2203 (1975). "As originally enacted, [the] ISDA required the Government to provide contracting tribes with an amount of funds equivalent to those that the Secretary 'would have otherwise provided for his direct operation of the programs.'" *Ramah*, 132 S.Ct. at 2186. As indirect cost calculation issues and funding shortfalls emerged, "[i]t soon became apparent that this secretarial amount failed to account for the full costs to tribes of providing services." *Id.*; *see also Oversight of Indirect Costs and Contract Provisions*

of the Indian Self-Determination and Education Assistance Act: Hearing before the S. Select Comm. on Indian Affairs, 97th Cong., at 1 (1982) (first oversight hearing on the Act's implementation focused largely on contract indirect cost problems).

The two main contracting agencies, the Bureau of Indian Affairs and the Indian Health Service, did little more than proffer or tinker with various budgetary measures, procedural guidelines, policies, systems and approaches. *See, e.g., Oversight of Indirect Costs and Contract Provisions of the Indian Self-Determination and Education Assistance Act: Hearing before the S. Select Comm. on Indian Affairs*, 97th Cong., at 2-29 and 14 (Statement of Kenneth L. Smith, Assistant Secretary for Indian Affairs, Department of the Interior and Statement of Dr. Joseph N. Exendine, Deputy Director, Indian Health Service, urging Congress to replace Self-Determination Act program contracting with grants, which the committee chairman questioned as a viable means of decreasing the bearing of indirect costs by tribes); U.S. Gen. Accounting Office, GAO/HRD-86-99, Rep. to S. Select Comm. on Indian Affairs, *Indian Health Service: Contracting for Health Services Under the Indian Self-Determination Act*, at 33 (Sept. 1986) (April 1986 Indian Health Service announcement of "pilot project" for a more rational, equitable, and consistent policy for determining and allocating indirect costs and funding).

Left to their own discretion, and in the interests of their own jobs and bureaucracy, the agencies

ignored or rejected reports, recommendations, and other assistance offered by the Interior Department's Office of Inspector General, the Office of Management and Budget, and a Presidential Council on Integrity and Efficiency, as well as by tribes and Indian organizations, to meaningfully address and ensure payment of contract support costs in full. *See* NCAI, National Policy Workgroup, *Contract Support Costs Final Report*, at 16-18 (July 1999).[2] Consequently, as contract support cost issues mounted in numbers and dollar amounts, tribal contractors began to file administrative appeals and court cases. *See, e.g., Alamo Navajo Sch. Bd.*, 1988 WL 44359 (Interior B.C.A., Feb. 24, 1988); *Tanana Chiefs Conf. v. Heckler*, No. 84-1756, 11 Indian L. Rep. 3093 (D.D.C. 1984) (memorandum opinion).

B. Congress Responded With Amendments Mandating Contract Support Cost Payments

Following hearings in May 1986 and April 1987, Congress prepared to curtail agency discretion and force full contract support cost funding. In the Senate, amendments were introduced to "strengthen . . .

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[2] In 1998 NCAI formed a National Policy Workgroup on Contract Support Costs. The Workgroup's Final Report (1999) is available at http://www.ncai.org/policy-issues/tribal-governance/Final_Report_on_CSC_July1999.html. The Report sets forth in great detail agency resistance to contract support cost funding and other issues during the years 1975-1999.

Indian self-determination while maintaining accountability for Federal funds," because, "[a]lthough the act has been, for the most part, a success, there have been problems." 133 Cong. Rec. S12395-02 (1987) (Statement of Senator Evans, R-WA, regarding S. 1703, a bill to amend the Act). Among them:

> Federal agencies have failed to pay their fair share of indirect costs for self-determination contracts. This has resulted in many tribes subsidizing Federal contract administration costs, and foregoing opportunities for economic development.

Id.

> By strengthening and clarifying congressional intent, we can do a lot for helping Indian tribal administrators to focus their attention on serving their people rather than constantly doing battle with Federal bureaucrats who want to bicker over responsibilities, funding, and oversight. If we are successful, we may actually reduce the bureaucracy and enhance the position of Native Americans to direct their own lives.

Id. (Statement of Senator Domenici, R-NM).

The Senate's Executive Summary of S. 1703 noted that when the Act was originally passed,

> [l]ittle was understood about indirect costs by the high level bureaucrats in these agencies. While Tribes struggled to gain administrative expertise, these agencies (which employed in excess of 28,000 people) did

> little to support the Tribes in dealing with the complexities of indirect costs. To date, neither agency has provided even one full-time position to assist Tribes in addressing this critical technical issue. Rather than addressing this contractual problem in a direct and effective manner by advocating sufficient funding, the two agencies, have attempted to bypass the problem by failing to request necessary operational funds and attempting to reduce or limit the recovery of legitimate indirect costs by Tribes.

133 Cong. Rec. S12395-02 (Executive Summary). The Executive Summary continued that, "[w]hile it seems ludicrous and ironic that the agenc[ies] responsible for implementing the intent of the Self-Determination Act would not only fail to advocate it but would actually work to undermine the establishment of strong and effective Tribal governments, it is nevertheless obvious that this" is what in fact has happened. *Id.*

> The . . . provisions of Section 106(h) of the Act have not been met. Neither the Secretary of the Interior nor the Secretary of Health and Human Services has developed a system that complies with that section of the law. That is to say, Tribes have been allocated *less* funds than the government would have spent for federal operation of the same program.

Id. (emphasis added).

Ultimately, Congress made clear that "the single most serious problem with implementation of the

Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts." S. Rep. No. 100-274, at 8 (1987). "It must be emphasized that [under Indian Self-Determination Act contracts] tribes are operating federal programs and carrying out federal responsibilities. . . ." *Id.* at 9. Because "[f]ull [federal] funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed," *id.* at 13, the 1988 Amendments would require payment of contract support costs, prohibit agencies from reducing such costs except under certain narrow conditions, and require the agencies to add the costs to their annual requested funding levels for contracts. Pub. L. No. 100-472, § 205, 102 Stat. 2285, *codified as later amended at* 25 U.S.C. § 450j-1(a) & (b); *see also* 134 Cong. Rec. S6943-01 (1988) (Debate on S. 1703, Indian Self-Determination Act amendments, Sec. 205, Contract Funding and Indirect Costs). Agencies also would be required to submit annual reports to Congress on contract support cost shortfalls and other issues by April of each year in time for the supplemental appropriation process. *See* 25 U.S.C. § 450j-1(c). Over strong agency objections to many of the contract support cost terms and other key aspects of the bill, *see* S. Rep. No. 100-274, at 43-58 (Statement of Ross O. Swimmer, Assistant Secretary-Indian Affairs, Department of the Interior, and Statement by Everett R. Rhoades, M.D., Director, Indian Health Service, Public Health Service), the

1988 Amendments were enacted. Pub. L. No. 100-472, 102 Stat. 2285 (1988).

As noted *supra*, Congress was skeptical of and ultimately rejected the agencies' proposal to turn Self-Determination Act contracts into federal grant programs. *Oversight of Indirect Costs and Contract Provisions of the Indian Self-Determination and Education Assistance Act: Hearing before the S. Select Comm. on Indian Affairs*, 97th Cong., at 2-29.

> The differences between self-determination contracts, grants, and cooperative agreements were the subject of extensive discussions with the tribes. The Committee considered deleting the term "contract" and using another term such as "self-determination grant" or "intergovernmental agreement." Ultimately, however, the Committee determined that the use of the term "contract" is important to convey the sense of a legally binding instrument that cannot be terminated by administrative action without the legal consequences that would be associated with the termination of contractual obligations by either party. Furthermore, the Committee believes that the retention of the term "contract" is consistent with the provision which authorizes the application of the Contract Disputes Act to self-determination contracts.

S. Rep. No. 100-274, at 19. The application of the Contract Disputes Act to Self-Determination Act contracts afforded "self-determination contractors the

procedural protections now given other federal contractors by that Act," including enforceable deadlines for agency contract dispute decisions, and "favorable treatment as to interest on amounts in disputes." *Id.* at 36; *see* 25 U.S.C. § 450m-1(d).

But in addition to providing Self-Determination Act contractors with procedural rights available to other government contractors via the Contract Disputes Act, the 1988 Amendments added critical protections for tribal contractors that other government contractors do not have. These include federal district court original jurisdiction over civil claims for injunctive relief to remedy agency violations, and original and concurrent jurisdiction for money damages claims arising under the Act in both federal district courts and what is now the U.S. Court of Federal Claims. *See* 25 U.S.C. § 450m-1(a). Moreover, "all agency action" arising under the Act is subject to judicial review, *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996), *citing* 25 U.S.C. § 450m-1(a) and S. Rep. No. 100-274, at 37 These additional protections were deemed necessary for tribal contractors because the transfer of federal responsibilities to tribes contemplated by the Act had been so hindered by agency "policies which have interfered with the contractual relationship contemplated by the Act between the Federal Government and tribal governments." S. Rep. No. 100-274, at 7.

The 1988 Amendments thus demonstrate Congress' "double layer" of protections for Self-Determination

Act contractors, and they were specifically and sharply tied to agency contract support cost transgressions.

> The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs. Existing law affords such contractors no effective remedy for redressing such violations.

S. Rep. 100-274, at 37.

C. Continued Agency Resistance Led To Further Amendments With Unique Protections For Tribal Contractors

Stunningly, agency resistance continued unabated after the 1988 Amendments. New agency regulations which Congress had required within a year were delayed until 1994. When published, the proposed regulations were far from being "relatively simple, straightforward, and free of unnecessary requirements or procedures." S. Rep. No. 103-374, at 2 (1994). Instead, they contained "hundreds of new requirements," and were in many instances "more restrictive than existing regulations and rais[ed] new obstacles and burdens for Indian tribes." *Id.* at 3. This situation prompted Congress to act once again, passing the Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, tit. I, 108

Stat. 4250 (1994); *see also* S. Rep. No. 103-374, at 14 (agency delay in promulgating and nature of regulations are an "unfortunate experience that is a major impetus for this bill.").

Building on the 1988 tribal contractor protections, the 1994 Amendments enhanced the tribes' protections based on the unique federal-tribal relationship underlying the Self-Determination Act. The overall "objective [was] to assure that there is no diminution in program resources when [federal] programs, services, functions or activities are transferred to tribal operation." 140 Cong. Rec. H11140-01 (1994). This would be accomplished by "circumscrib[ing] as tightly as possible" any remaining agency discretion with respect to contracting matters. *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d at 1344.

To eliminate agency discretion and regulatory authority, the 1994 Amendments begin with new mandatory "model" contract terms which agencies are prohibited from altering absent tribal consent. 25 U.S.C. § 450*l*(a)(1); *see also* S. Rep. No. 103-374, at 3 (1994 Amendments "prescribe[] the terms and conditions which must be used in any contract . . . thereby eliminating the need for regulations [and agencies] are no longer vested with authority to promulgate regulations under the Act."). Foremost among the model terms is a special rule of construction for the Act and its contracts, 25 U.S.C. § 450*l*(c) ("Each provision of the Indian Self-Determination and Education Assistance Act and each provision of this Contract shall be liberally construed for the

benefit of the Contractor. . . ."), a provision this Court found important in its *Ramah* decision, 132 S.Ct. at 2187 and 2193. This critical provision echoes this Court's federal Indian law canons of construction and demonstrates vividly how the Act's contract terms are rooted in the unique federal-tribal relationship, *see e.g., Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 467 U.S. 138, 149 (1984) ("it is a settled principle of statutory construction that statutes passed for the benefit of . . . Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians"); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) ("we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them"). The model terms also provide for forced contract award amounts and mandatory funding levels, 25 U.S.C. §§ 450j-1(a)(3)(B); 450j-1(b); 450j-1(g); 450*l*(c)-(b)(4) and (b)(9), and give contractors – not the agencies – the choice of whether contract payments will be in quarterly, semiannual or annual lump-sum amounts, 25 U.S.C. § 450*l*(c)-(b)(6)(B).

The 1994 Amendments also expedite tribal contractor access to federal district courts for injunctive relief upon an agency's refusal to contract or refusal to fund a contract, 25 U.S.C. §§ 450f(b)(3) and 450m-1(a). In the pursuit of administrative claims, the burden of proof regarding an agency's refusal to contract or an agency's rescission of a contract is on the agency, not the contractor. *Id.* at §§ 450f(e) and 450m. Similarly, the burden of proof is on agencies in

the event of any suspension, withholding or delay of contract funding payments, *id.* at § 450j-1(l)(2), and the agencies' rights to suspend or withhold funds are statutorily limited, *id.* at § 450j-1(l)(1). These are just some of the many Self-Determination Act provisions that are unheard of in routine government contract law.

Under the 1994 Amendments, Self-Determination Act contracts also are generally immune from agency rules and regulations, 25 U.S.C. § 450k; *see also Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d at 1344 (agencies are prohibited from promulgating any regulations not expressly allowed by the Act), and from agency "program guidelines, manuals, [and] policy directives," 25 U.S.C. § 450*l*(c)-(b)(11). Further, other than the Contract Disputes Act provisions already specifically incorporated into the Act, the 1994 Amendments make clear that Self-Determination Act contracts are altogether *exempted* from the federal procurement system and other routine general government contract laws, 25 U.S.C. §§ 450b(j) and 450j(a)(1). On the other hand, Self-Determination contracts are subject to special tribal employment and contract preference laws, 25 U.S.C. § 450e(c). Tribal contractors also enjoy special limited audit requirements, 25 U.S.C. § 450c(f), and agency monitoring activities are strictly limited, 25 U.S.C. § 450*l*(c)-(b)(7)(C). All of these provisions place these contracts at a distance from routine government contracts and show that remedial rights under the

Contract Disputes Act are a floor, not a ceiling on the rights tribes enjoy vis-à-vis federal agencies.

These are some of the extraordinary safeguards Congress found necessary to enact to protect tribal contractors from federal agency resistance to the Act's contracting mandates, and they are based on the federal-tribal relationship embodied in the Act. "[T]he ISDEA's legislative history is replete with references to agency malfeasance in the ISDEA contracting process." *Navajo Health Found. – Sage Mem'l Hosp. v. Burwell*, No. CIV-14-0958, slip op. at 65 (D.N.M. Aug. 31, 2015), *citing Navajo Health Found. – Sage Mem'l Hosp. v. Burwell*, 2015 WL 1906107, at *50-52 (D.N.M. Apr. 9, 2015). "[N]early every significant amendment that Congress has made to the ISDEA since its inception reflects a desire to curtail [agency] authority to administer ISDEA contracts, and to expand tribes' and tribal organizations' authority to administer those contracts themselves." *Navajo Health Found. – Sage Mem'l Hosp. v. Burwell*, 2015 WL 1906107, at *51 (D.N.M. Apr. 9, 2015).

III. WHILE THE ACT'S GOVERNMENT CONTRACT LAW PROVISIONS ARE THE BASIS FOR CONTRACT ENFORCEMENT AND LIABILITY, PROCEDURAL AND REMEDIAL ISSUES LIKE EQUITABLE TOLLING SHOULD TAKE INTO ACCOUNT THE UNIQUE NATURE OF THESE CONTRACTS AND THEIR FEDERAL-TRIBAL RELATIONSHIP UNDERPINNINGS

A. Despite The Amendments, Agency Resistance Persisted And Indian Health Service Contract Support Cost Funding Shortfalls Skyrocketed To Over $100,000,000

The Indian Health Service's contract support cost policies from the mid-1990s were tepid efforts that fell well short of achieving full payment to all tribes, and as a consequence overall shortfalls steadily grew. *See, e.g.*, Indian Health Service Memorandum No. 92-2 (Feb. 27, 1992) (establishing a new designated Fund for new requests for contract support costs); Indian Health Service Circular No. 96-04 (Apr. 12, 1996), https://www.ihs.gov/IHM/index.cfm?module=dsp_ihm_circ_main (formalizing policy that the Fund will be used on a "first come, first serve" queue basis).[3]

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[3] At least two courts quickly halted or invalidated the queue system. *Shoshone-Bannock Tribes v. Shalala*, 988 F.Supp. 1306 (D. Or. 1997), *aff'd on reconsideration*, 999 F.Supp. 1395 (D. Or. 1998); *California Rural Indian Health Bd. v. Shalala*, No. C-96-3526 (N.D. Cal. Aug. 25, 1998).

However, in response to the 1994 Amendments and "[b]eginning in fiscal year 1996, rapid growth in self-determination contracting activities, coupled with static appropriations for the IHS' Indian Self-Determination Fund and no increases for inflation, led to sharp increases in contract support shortfalls." NCAI, *Contract Support Costs Final Report*, at 32. By fiscal year 1997, the Indian Health Service's shortfall had reached over $35 million, $15 million of which was for existing contracts. Indian Health Service, Report to Congress on Contract Support Cost Funding in Indian Self-Determination Act Contracts, at 6-7 (May 1997), http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/contract-support/IHS_-_1997_CSC_Report_to_Congress_Cost_Excalation.pdf.

In 1998, at Congress' direction, the discredited queue system was discontinued, H.R. Conf. Rep. No. 105-825, at 1233-1234 (1998), but its replacement system merely aligned underpayment ratios among contractors. *See* Indian Health Service, Circular No. 2000-01 (Jan. 20, 2000), https://www.ihs.gov/IHM/index.cfm?module=dsp_ihm_circ_main; Indian Health Service, Circular No. 2001-5 (July 6, 2001), https://www.ihs.gov/IHM/index.cfm?module=dsp_ihm_circ_main; Indian Health Service, Circular No. 2004-03 (Sept. 1, 2004), https://www.ihs.gov/IHM/index.cfm?module=dsp_ihm_circ_main; www.ihs.gov/PublicInfo/Publications/IHSManual/Parts_index.cfm (2007). Neither system was designed to achieve, nor did either in fact achieve, full contract support cost payments due all tribes.

Congressional increases in Indian Health Service contract funding in fiscal years 1999, 2000 and 2001 deflected the situation temporarily. When the increases stopped, annual funding shortfalls more than doubled in four years. *See* Indian Health Service, Fiscal Year 2002 Contract Support Cost Funding Report ($40.4 million), http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/contract-support/IHS_FY_2002_CSC_Shortfall_Report_-_FINAL_2001_data.pdf; Indian Health Service, Fiscal Year 2006 Contract Support Cost Funding Report ($90 million), http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/contract-support/IHS_FY_2006_CSC_Shortfall_Report_-_FINAL_2005_data.pdf. In fiscal year 2011, before this Court's *Ramah* decision, the shortfall was $118,476,505. Indian Health Service, 2012 Report to Congress on Funding Needs for Contract Support Costs of Self-Determination Awards (Based on Fiscal Year 2011 Data), http://www.ihs.gov/newsroom/index.cfm/reportstocongress/?yr=0, at 5.

B. This Court's Decisions In *Cherokee* And *Ramah* Relied On The Act's Government Contract Law Provisions To Determine Federal Liability For Contract Cost Payment

In the wake of the 1988 and 1994 Amendments, there followed widespread litigation by tribal contractors to enforce the contract support cost payment mandate. In addition to the claims of numerous

individual tribes, major cases included *Ramah*, a still-ongoing 1990 class action of all tribal contractors who had contracts with the Bureau of Indian Affairs. *See* Brief for Petitioner, at 12. Additional contract support cost class actions against the Indian Health Service were filed in federal district courts in *Cherokee Nation v. United States*, No. 6:99-cv-0092 (E.D. Okla. filed Mar. 5, 1999), and *Pueblo of Zuni v. United States*, No. 1:01-cv-01046 (D.N.M. filed Sept. 10, 2001). As Petitioner explains, class certification was sought but ultimately denied in these two cases. *See* Brief for Petitioner, at 13-18.

Meanwhile, the Cherokee Nation's and its co-plaintiff's separate administrative claims reached this Court in *Cherokee*, which overturned lower court decisions and conclusively established federal liability for unpaid Indian Health Service contract support cost amounts. The Court in *Cherokee* acknowledged the Act's express full payment mandate, *Cherokee*, 543 U.S. at 634, *citing* 25 U.S.C. §§ 450j-1(a), and the Court reasoned that the government contract law provisions incorporated into the Act serve to enforce that mandate. "[T]he Act says that if the Government refuses to pay, then contractors are entitled to 'money damages' in accordance with the Contract Disputes Act." *Cherokee*, 543 U.S. at 639, *citing, inter alia*, 25 U.S.C. §§ 450m-1(a), 450m-1(d). *Ramah* expressly reaffirmed *Cherokee* on this central point. *Ramah*, 132 S.Ct. at 2189 (*Cherokee* held that "the Government was obligated to pay the Tribes' contract support costs in full [and this conclusion] followed

directly from well-established principles of Government contracting law.").

C. Self-Determination Act Contract Claim Procedural And Remedial Issues Should Take Into Account The Act's And The Contracts' Unique Protections Based On The Federal-Tribal Relationship

As discussed *supra*, the Indian Self-Determination Act, 25 U.S.C. § 450m-1(d), specifically incorporates the Contract Disputes Act, which since 1994 has imposed a six-year statute of limitations on claims presented to agencies, *see* 41 U.S.C. § 7103. Following its earlier decision in this case, *Menominee Indian Tribe v. United States*, 614 F.3d 519 (D.C. Cir. 2010), the Court of Appeals below reasoned that this limitations statute is subject to equitable tolling, but then concluded that equitable tolling did not apply to the Tribe's claims. *Menominee Indian Tribe v. United States*, 764 F.3d 51 (D.C. Cir. 2014). In reaching this conclusion, the Court of Appeals refused to consider, inter alia, the federal-tribal relationship as a factor relevant in the equitable tolling calculus. 764 F.3d at 62. This refusal is directly contrary to the Act's intent, as recognized by the Court of Appeals for the Federal Circuit on this point in *Arctic Slope Native Ass'n v. Sebelius*, 699 F.3d at 1297-1298.

Under the equitable tolling doctrine, courts may modify statutory time limits for appropriate equitable relief. *Irwin v. Department of Veterans Affairs*, 498

U.S. 89, 96 (1990). The federal judiciary is empowered and particularly obligated to take into account equity principles under federal law when faced with determining procedural and remedial issues related to federally-created rights, such as those at stake under the Indian Self-Determination Act. *Johnson v. Railway Express Agency*, 421 U.S. 454, 470 (1975). Generally, a litigant seeking equitable tolling must prove: (1) that he has been pursuing his rights diligently; and, (2) that some extraordinary circumstance stood in his way and prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010) (citation omitted). As is customary, judicial exercise of equitable powers is to be guided by flexibility, the facts and circumstances of each case, and justice. *Id.* at 649-650.

The Court of Appeals in *Arctic Slope Native Ass'n v. Sebelius* correctly determined that the unique federal-tribal relationship, as rooted in the Self-Determination Act, properly rises to the level of an appropriate equitable tolling analysis factor.

> The Supreme Court and Congress have repeatedly recognized the special relationship between the government and Indian tribes. *E.g., United States v. Mitchell*, 463 U.S. 206, 225 (1983); 25 U.S.C. § 450a(b) (reaffirming the federal government's "unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole"). Consequently, we must judge the government's conduct with the Indian tribes by "the most exacting fiduciary standards." *Seminole Nation v. United States*,

> 316 U.S. 286, 297 (1942). This special relationship is especially crucial under the ISDA, which Congress passed to facilitate and promote economic growth and development amongst the Indian tribes. *See generally* S. Rep. No. 100-274, at 4-7 (1987) (detailing federal policies encouraging Indian self-determination and tribal economic development). The Select Committee on Indian Affairs recognized that self-determination contracts supporting local government services on Indian lands were "essential to the success of Indian economic development efforts." *Id.* at 7. Although not dispositive, the existence of the special relationship between the government and Indian tribes supports our holding.

699 F.3d at 1297-1298 (citations in original). The Federal Circuit appropriately understood the import of the federal-tribal relationship in the Act and its implementation history. The Act itself is an exceptional pronouncement of the historic and unique relationship.

> There is no other example of a Secretary being required to transfer resources to assist another governmental entity and simultaneously to divest itself of its own resources. The Committee [also] recognizes that the uniqueness of this Act has made its implementation a complex process for both the tribes and the Federal agencies.

S. Rep. No. 100-274, at 6.

A court's application of equitable tolling principles in the context of Self-Determination Act contracts must therefore take into account the unique framework in which these *sui generis* contracts arise, a framework which stands considerably apart from routine government contract law. A ruling that the existence of the federal-tribal relationship is an appropriate factor to assess in Self-Determination Act contract cases applying equitable tolling is well-supported by Congress' exhaustive 1988 and 1994 measures to protect and enhance tribal contractor rights against the agencies, particularly when, as this Court noted in *Ramah*, the Act "is [to be] construed in favor of tribes. . . ." 132 S.Ct. at 2193.

As *Cherokee* and *Ramah* hold, the Act's government contract law protections provide a basis for contract enforcement and to remedy contract underpayments. But that enforcement scheme is complimentary to the Act's many other enforcement and remedial provisions, all of which are unique to tribal contracting activities under the Act. Those additional and powerful measures reflect Congress' special solicitude for Indian tribes and are expressions of the unique federal-tribal relationship. In this respect, the unique federal-tribal relationship in the Self-Determination Act and contracts under the Act is not unlike other instances of special congressional protection which this Court has recognized justify the application of equitable tolling principles. *E.g.*, *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (the long-standing solicitude of Congress

for veterans as reflected in special veterans benefits claims statutory review and adjudication scheme supports equitable tolling).

As the dissent stated in *Arctic Slope Native Ass'n v. Department of Health and Human Serv.*, 11-2 B.C.A. ¶ 34,778 (C.B.C.A. 2011), "Congress and the courts have been at least as solicitous of the Indians as they have been of veterans and Social Security beneficiaries, and the same reasoning should apply to the administrative scheme set out in the ISDA." *Arctic Slope Native Ass'n v. Department of Health and Human Serv.*, 11-2 B.C.A. ¶ 34,778 (Steel, B.J., dissenting), *rev'd, Arctic Slope Native Ass'n v. Sebelius*, 699 F.3d 1289 (Fed. Cir. 2012). This Court's recognition in *Cherokee* and *Ramah* that Congress has afforded tribes standard government contract law protections to enforce Self-Determination Act contracts sets a floor, but not a ceiling, on tribes' statutory rights under these unique contracts. Just as Congress has enacted special measures reflecting its "solicit[ude]" for tribal rights under the Act, so, too, should the courts be particularly solicitous of Indian tribes when applying equitable tolling principles in cases arising under the Act.

CONCLUSION

The decision of the Court of Appeals should be reversed, and this Court should hold that the equitable tolling analysis in Indian Self-Determination Act

claims by tribal contractors should take into account the unique relationship between the United States and Indian tribes.

Dated this 9th day of September, 2015.

Respectfully submitted,

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